Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners
v.
ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONERS BY THE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI THAT APPEAR ON INSIDE COVER

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether, in reviewing challenges to prison rules and regulations on First Amendment religious grounds, courts are permitted to substitute their judgments for those of expert prison officials regarding matters of prison administration and to order adoption of those measures which, in the courts' judgment, impose the least restrictions on prisoners' constitutional rights?

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INTEREST OF THE AMICI CURIAE

The amici States and the District of Columbia each operate extensive prison systems. They are charged not only with the day-to-day management of the many thousands of individuals in their collective custody, but also with assuring the safety and security of those individuals, as well as that of their employees, visitors to their facilities, and the public in general.

As this Court has recognized many times in the past, this is, at best, an exceptionally difficult undertaking because of the unique and complex considerations which are involved and the limited resources which are available to prison administrators. To ensure the successful operation of their

facilities, prison officials necessarily must implement rules and regulations affecting various aspects of daily prison life which, in their professional judgment, will promote security and order in their institutions. Typically, those rules and regulations establish standards governing the types of personal property prisoners may possess, standards for personal grooming, the clothing they may wear, movement within the prison, and visitation from outside it.

Frequently, prison rules and regulations conflict with the unfettered exercise of a prisoner's religion. Some religions specify that certain observances be held, sometimes in congregational form, on particular days or at a specific time of day. Others require the use of objects or substances ordinarily

considered to be contraband. Still others direct adherents to adopt a particular manner of dress, forbid the cutting of hair or impose other grooming requirements which may conflict with those of the prison.

Amici are faced on a daily basis with requests by prisoners that general prison rules governing security or order within the institution be modified, on an individual or group basis, to permit prisoners to observe fully those practices dictated by their religions. While amici all make a genuine effort to accommodate the religious practices of prisoners with the primary institutional goals of safety and security, prison administrators sometimes conclude that a request for modification must be denied because it would jeopardize those essential institutional goals.

With increasing frequency, denial of those requests is the subject of litigation. Although this Court has specifically addressed the manner in which prisoners' First Amendment claims are to be evaluated, various courts of appeals have employed differing approaches when faced with claims of a religious nature. In light of this, amici believe it is imperative that the Court clarify the standard which the courts should apply in assessing a claim that prison administrators have violated the Constitution by declining to waive an institutional rule which prevents a prisoner from fully exercising his religion. Because they also believe that the rule endorsed by the Third Circuit in this case represents a serious and unjustified departure from this Court's well-established principles

of deference to the expertise of prison officials in such matters, which will create untenable practical problems, they now join with petitioners in urging this Court to reverse the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

1. In reviewing challenges to prison regulations on First Amendment religious grounds, the Court of Appeals held that courts must consider alternative measures which might be implemented to achieve the same penological goals. If, after review of those alternatives, a court concludes in its judgment that there is a less restrictive alternative, the regulations at issue will be held to violate a prisoner's constitutional rights, even though it was established that those regulations were instituted as the result of the exercise of valid professional judgment by prison administrators. This rule is irreconcilable with prior decisions of

this Court which uniformly have established that, in cases where a prison regulation designed to further a legitimate penological interest is challenged on First Amendment grounds, courts are required to defer to the expert judgment of prison officials that the measure effectuates the intended purpose. Unless it has been shown by substantial evidence that the regulation at issue amounts to an exaggerated response, or is unreasonable, it is to be upheld. Because the Court of Appeals' standard materially and unjustifiably alters these well-established principles in cases involving religious claims, it should be rejected by this Court.

2. Moreover, the new standard prescribed by the Court of Appeals will create difficult and unmanageable practical problems. It will serve as a powerful straitjacket to the exercise of professional judgment in an area where it is critical that administrators not be unduly hampered in performing their duties. Given the volatility of the prisons, corrections officials must be given a wide berth to implement policies they reasonably believe are necessary to ensure the safe and orderly operation of the institutions they are responsible for administering.

ARGUMENT

THE STANDARD ANNOUNCED BY THE COURT OF APPEALS FOR REVIEW OF CHALLENGES TO PRISON REGULATIONS ON FIRST AMENDMENT RELIGIOUS GROUNDS REPRESENTS A DRASTIC AND UNJUSTIFIED DEPARTURE FROM THIS COURT'S DECISIONS.

I. INTRODUCTION

As its opinion in this case indicates, the Court of Appeals radically modified the standard for review of prisoners' religious claims that it previously had announced in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), reh'g denied, 643 F.2d 103 (3d Cir. 1980). (Pet. App. 2A).[1] The St. Claire

[1]"Pet. App." refers to the appendix to the petition for writ of certiorari filed in this matter.

standard, which has been adopted by two other courts of appeals, see Hill v. Blackwell, 774 F.2d 338, 342 (8th Cir. 1985); Brown v. Johnson, 743 F.2d 408, 412-13 (6th Cir. 1984), cert. denied sub nom., Inosencio v. Johnson, 469 U.S. 1215 (1985), was grounded in critical part in this Court's decisions in Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); and Pell v. Procunier, 417 U.S. 817 (1974). See St. Claire, 634 F.2d at 112-15.

Under the former standard, when a particular institutional practice was challenged, the state was obliged to produce evidence that to permit the practice would create a potential danger to institutional security or other valid

penological goal. The requisite evidence could consist of the expert testimony by responsible officials, provided that their opinions were sincerely held and arguably correct. Once the state satisfied that burden, courts were to defer to the expertise of the prison officials, "even though a similar showing might be unimpressive if submitted to justify restrictions upon members of the general public," unless the prisoner proved, by substantial evidence, that the officials exaggerated their response to security concerns or that their beliefs were unreasonable. Id. at 114-15.

Although this Court has not discredited, or even altered, the principles articulated in the cases on which the former standard was based, nor has it

since addressed the specific legal issue involved in this case, the Court of Appeals nevertheless saw fit to completely recast its earlier rule observing only that, in its view, the former rule did not properly reflect the sort of "mutual accommodation," see Wolff v. McDonnell, 418 U.S. 539, 556 (1974), envisioned by this Court. (Pet. App. 7A). Its earlier standard was wrong, the Court of Appeals concluded, because it did not require courts to explore the feasibility of accommodating the practices prisoners sought to be permitted. (Pet. App. 7A-9A).

Under the new standard it has devised, the state now "must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that

no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." (Pet. App. 9A) (footnote omitted) (emphasis added). In applying this standard, the Court of Appeals stated further that

> [t]he expert testimony of prison officials should be given due weight, but such testimony is not dispositive of the issue whether no reasonable adjustment is possible . . . . [T]he . . . court must take into account all materials tendered in opposition . . . that raise genuine issues of material fact. Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a

> central religious practice cannot be justified and violates the prisoners' first amendment rights.

(Pet. App. 9A-10A) (footnote omitted).

While the new standard announced by the Court of Appeals may appear appealing at first glance, closer scrutiny reveals that it is clearly at odds with the principles established by this Court and is unsound from a practical standpoint. It should, amici submit, be rejected by this Court.

II. THE COURT OF APPEALS HAS IMPROPERLY REQUIRED THAT COURTS SUBSTITUTE THEIR JUDGMENT FOR THE REASONABLE JUDGMENTS OF EXPERT PRISON OFFICIALS IN REVIEWING CLAIMS THAT PRISON REGULATIONS VIOLATE INMATES' FIRST AMENDMENT RELIGIOUS RIGHTS.

A. In Considering Claims that Prison Rules Unjustifiably Inhibit the Exercise of First Amendment Rights, the Proper Scope of Review Is Whether the Rules at Issue Constitute an Exercise of Valid Professional Judgment.

Although imprisonment does not automatically deprive an individual of his constitutional rights, see Wolff v. McDonnell, supra, 418 U.S. at 555, this Court "has long recognized that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction

justified by the considerations underlying our penal system.'" Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 125, quoting Price v. Johnston, 334 U.S. 266, 285 (1948). "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment. . . ." Jones, 433 U.S. at 125. In short,

> a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose

> custody and care the prisoner has been committed in accordance with due process of law.

Pell v. Procunier, supra, 417 U.S. at 822. Penological interests often necessitate major restrictions on a prisoner's rights, including those arising under the First Amendment. Jones, 433 U.S. 129-30.

While the goals and objectives of the prison system are multifarious, "central" to other goals is maintenance of institutional security and order. Pell, 417 U.S. at 823. Deciding which policies and practices further those interests is a task with which "courts are ill equipped to deal. . . ." Bell v. Wolfish, supra, 441 U.S. at 547 n. 29. Rather, as the Court reiterated last term, "a prison's internal security is

peculiarly a matter left to the discretion of prison administrators," Whitley v. Albers, No. 84-1077 (March 4, 1986), slip op. at 8-9, quoting Rhodes v. Chapman, 452 U.S. 337, 349 n. 14 (1981). These officials are to be accorded "wide-ranging deference" with respect to the adoption and execution of policies for preserving internal order and discipline. Whitley, supra, slip op. at 8-9, quoting Bell v. Wolfish, supra, 441 U.S. at 547. This deference extends both to measures which are implemented in response to actual problems as well as those which are prophylactic in nature. Whitley, slip op. at 9; Jones, 433 U.S. at 132-33.

The principle of deference to the professional judgment of prison administrators not only reflects "a healthy

sense of realism" that the "complex and intractable" problems of the prisons "are not readily susceptible of resolution by [court] decree" and require the expertise of qualified professionals but also that, first and foremost, administration of the prisons is a matter "peculiarly within the province of the legislative and executive branches of government" not the judiciary. Procunier v. Martinez, 416 U.S. 396, 405 (1974).

This is not to say this principle gives prison administrators license to disregard constitutional rights or that actions taken by them in bad faith or without legitimate basis are insulated from review. See Whitley, slip op. at 9. Rather, it means that, unless there is substantial evidence that a

prison regulation constitutes an exaggerated response to security considerations, Pell, 417 U.S. at 827, or that the beliefs of prison officials are unreasonable, Jones, 433 U.S. at 128, their professional judgment is to be honored--not supplanted--by the courts.

In the past, this Court has observed that because

> [j]udges, after all, are human[, t]hey, no less than others in our society have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of [a] particular institution . . . .

Bell, 441 U.S. at 562. Many "in the name of the Constitution, [have] become increasingly enmeshed in the minutae of prison operations." Ibid. Such action,

though well-intended, is nevertheless improper. "The wide range of 'judgment calls'" that must be made on a daily basis are more properly, "confided to officials outside the Judicial Branch of Government." Ibid.

Thus, under the well-settled principles articulated by this Court, when a prison rule or practice is alleged to violate an inmate's First Amendment rights, it is not the function of the reviewing court to consider a panoply of alternative measures and to select the one it believes is most desirable. Instead, the proper inquiry to be made by the Court is whether the rule or practice in question constitutes an exercise of valid professional judgment.

B. The Court Has Endorsed the Same Limited Scope of Inquiry in Connection with Constitutional Claims by Non-Prisoners.

This same standard has been held by the Court to apply even in situations where an individual's constitutional rights are not subject to strictures such as those incident to lawful incarceration. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court held that, in assessing whether certain types of constitutionally-mandated training had to be provided to an involuntarily committed, mentally retarded individual, an individual "entitled to more considerate treatment and conditions of confinement" than prisoners, id. at 322, "'the Constitution only requires that the

courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" Id. at 321, quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980).

More recently, this Court applied this limited scope of review in Goldman v. Weinberger, No. 84-1097 (March 25, 1986). In reviewing a claim that military regulations restricting apparel impermissibly infringed upon a serviceman's First Amendment right to exercise his religion, the Court concluded that it was not the duty of the courts to select from among conflicting and equally valid professional opinions as to whether the regulation was necessary to promote military goals. Rather,

the only inquiry is whether there has been, in fact, a valid exercise of professional judgment in instituting the regulation at issue.[2]

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[2]In the past, this Court has seen a parallel between the exercise of First Amendment rights in the military and in the penal context. See Jones, 433 U.S. at 133-34. Indeed, there is good reason for such an analogy. While it is clear in both contexts that an individual retains his First Amendment rights, those rights are necessarily limited by unique competing interests present in each of these areas. See Jones, supra; Pell, supra; Goldman, slip op. at 4, citing, Chappell v. Wallace, 462 U.S. 296, 304 (1983). Successful operation of the military and the prisons requires expertise peculiar to individuals responsible for those functions. See Chappell, 462 U.S. at 305; Jones, supra. In deciding whether a particular practice is justified in light of the goals of each, courts have been directed to defer to the expertise of the respective officials in those areas. See Rostker v. Goldberg, 453 U.S. 57, 70 (1981); Chappell, 462 U.S. at 305; Jones, supra.

C. Each Component of the Standard Imposed by the Third Circuit Conflicts with Principles Articulated by this Court.

While the Third Circuit acknowledged the principle of deference, see (Pet. App. 6A-7A), it did nothing more than pay it lip service. The rule it announced in this case not only fails to incorporate those well-established precepts, but actually forces the courts to do precisely what this Court repeatedly has said they should not--that is, to immerse themselves in the details of prison administration. Because each of the three elements of the Court of Appeals' new standard represents a serious departure from the principles established by this Court, it should be rejected in its entirety.

1. According to that standard, whenever a regulation or practice is challenged on religious grounds, the state must show first, "that the challenged regulations were intended to serve . . . the important penological goal of security . . . ." (Pet. App. 9A) (emphasis added). It is apparently the Court of Appeals' view that only those regulations which further "security" interests may properly impinge upon a prisoner's right to exercise his religion.[3] This notion is clearly

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[3]As Judge Hunter's dissent points out, the Court of Appeals' decision is hopelessly unclear in this regard. (Pet. App. 23A-24A). While the majority acknowledged that other legitimate penological interests might be served by prison rules and regulations which are said to infringe on First Amendment rights, the new rule of general application is formulated strictly in terms of security concerns. (Pet. App.

(FOOTNOTE CONTINUED ON NEXT PAGE)

contrary to this Court's opinion in Pell, 417 U.S. at 822-23, which identified other legitimate policies and goals of the corrections system which properly can be served by prison rules and regulations, including deterrence of crime, rehabilitation, and isolation of offenders from the rest of society. Where any of these other interests is served by a prison rule or practice, courts must take these interests into

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(FOOTNOTE CONTINUED)

9A, n.2). The omission of any other legitimate penal objectives from that rule is problematic, if for no other reason than the confusion it will produce. See (Pet. App. 24A).

That the Court of Appeals was aware of other objectives that might also be served by prison rules, but evidently chose not to mention them in creating this critical rule, indicates that, in the Court of Appeals' view, only security objectives may lawfully place constraints on the exercise of First Amendment religious rights in prison.

account in considering constitutional challenges. Id. at 823. Thus, insofar as the Court of Appeals' test implies that a challenged regulation may be upheld only if it furthers a security interest, it is contrary to this Court's decisions. See Jones, 433 U.S. at 129.

2. The second element of that standard obliges the state to demonstrate that the regulations in issue actually "do serve" the intended security interest. (Pet. App. 9A). In this regard, the Court of Appeals has indicated that the state has a burden to establish that its security concerns are "genuine" and "based on more than speculation." (Pet. App. 9A). The court expressly pointed out that, in this case, no security problems had arisen before the policies at issue were made

more restrictive. (Pet. App. 11A). This line of reasoning represents a dangerous incursion into the ability of prison officials to prevent breaches of security.

In holding as it did, the Court of Appeals ignored this Court's direction that prison officials must be permitted to anticipate and "forestall" threats to security before problems occur. Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 132-33. See also Whitley v. Albers, supra, slip op. at 9; Bell v. Wolfish, supra, 441 U.S. at 551 n. 32. This is a serious flaw in the approach taken by the Court of Appeals. Indeed, even outside the prison context, the Court has recognized that the potential for disruption may justify official actions

which affect First Amendment rights. See Connick v. Myers, 461 U.S. 138, 152 (1983). The idea that an inquiry into past security problems is even relevant seriously erodes the ability of prison administrators to anticipate problems and implement new security measures in advance of a serious breach of security. Requiring prison administrators to demonstrate in concrete terms that a given measure actually has resulted in preventing a breach of security imposes an undue, if not impossible, burden on those officials. Where a measure has been instituted to forestall a particular problem and succeeds in doing so, prison officials almost never will be in a position to demonstrate that the absence of a problem was the direct result of the action in question. In

effect, this particular requirement penalizes diligent administrators who have had the forethought to take preemptive action to quell potential trouble spots.

3. Notwithstanding these defects in the rule fashioned by the Court of Appeals, by far the greatest and most serious deviation from the principles of this Court, which we have discussed above, is its third and last component which requires that, in each case, a court must determine whether there exist methods other than those chosen by prison officials which permit inmates to exercise their religion "without creating bona fide security problems." (Pet. App. 9A) (footnote omitted). By this direction, the Court of Appeals apparently is requiring that

prison regulations impose on a prisoner's free exercise rights the fewest restrictions which are consistent with institutional security. This Court, however, repeatedly has rejected a least restrictive alternative analysis in this area. See Block v. Rutherford, 468 U.S. 576, 589-90 n. 10, 591 n. 11 (1984); Bell, 441 U.S. at 542 n. 25. Requiring the courts to receive and scrutinize evidence relating to possible alternative approaches which might be taken in a given situation--as the Court of Appeals has expressly done here, (Pet. App. 10A)--will cause them, as the dissent aptly puts it, to embark on a "dubious new calling," that of "arbitrators in disputes between prison officials and inmates." (Pet. App. 17A). Quite simply, it unjustifiably

compels the courts to assume the mantle of prison administrators, and to engage in an enterprise into which this Court has repeatedly stressed that they are not to venture.

D. There Is No Legitimate Basis for Treating Prisoners' Religious Claims Differently than Other First Amendment Claims.

The Court of Appeals apparently was influenced in formulating its standard by the fact that religious rights are at issue. But the nature of the underlying right calls for no different mode of analysis. There is "no principled basis on which to create a hierarchy of constitutional values. . . ." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464,

484 (1982). Accordingly, there was no legitimate basis for the Court of Appeals to eschew the deferential test this Court has applied in other cases involving First Amendment challenges to prison policies. Jones, supra; Pell, supra. Nor was there a need for the Court of Appeals to discredit its former standard for allegedly falling short of the "mutual accommodation" prescribed by this Court. As the dissent has pointed out and the foregoing discussion makes clear, the new standard adopted by the Court amounts to an "investiture of [that] term . . . with a new meaning." (Pet. App. 21A).

In light of these serious defects in the standard of review the Court of Appeals has devised, it should be rejected.

III. THE COURT OF APPEALS' STANDARD WILL CREATE INSURMOUNTABLE PRACTICAL PROBLEMS.

Apart from its clear discord with the decisions of this Court, the rule announced by the Court of Appeals is likely to create grave practical problems. As the dissent below points out, the ad hoc consideration mandated by the decision will open "the door to a floodgate of future litigation to determine what 'reasonable' accommodation must be permitted to override security or other penological objectives." (Pet. App. 21A). The uncertainty of what is constitutionally required in each case undoubtedly will invite the sort of "repetitive, piecemeal litigation" this Court has previously recognized as highly undesirable. See Procunier v. Martinez, supra, 416 U.S. at 407.

Such a proliferation of litigation not only will markedly tax the time and resources of the courts, but also the already limited resources available to prison officials, see id. at 404, who must defend their policies against constitutional challenges. Moreover, because the vast majority of plaintiffs who initiate such litigation will be proceeding in forma pauperis, those officials can have no realistic prospect of recouping even a small portion of the costs of litigation when they are successful. The same considerations also make it highly unlikely that purely frivolous and vexatious litigation will be deterred by a potential award of costs and attorneys' fees in favor of the defendant officials.

Even worse are the problems that will plague the day-to-day administration of the prisons. Under the Court of Appeals' rule, it would be impossible for corrections officials to anticipate what is required of them. Only after a matter is resolved by litigation would prison officials know if a measure is constitutionally acceptable. During the protracted period of time that it takes for litigation to run its course, prison officials will have no clear guidance as to how to deal with a particular issue.

Administrators' concerns that ultimately they might be subject to a damages award or at least costly litigation will stultify the exercise of their best professional judgment and will stymie initiation of new programs within the prisons. Knowing that their

choice among several available security measures may be scrutinized by a federal court in terms of imposing the least restriction on inmates' rights, prison officials are very likely to institute fewer restrictions than those they believe, in their professional judgment, are warranted. Similarly, officials might be reluctant to initiate new or experimental programs which would be beneficial to prisoners if there is the possibility that relevant rules and regulations might be determined to constitute an improper infringement of inmates' religious rights. Cf. Hewitt v. Helms, 459 U.S. 460, 470-71 (1983).

Their concerns in this regard would be, by no means, illusory. For, as it has been pointed out, "[a] judge

would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation. . . ." Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

The most serious consequence of all this, however, is the very real possibility that, where prison administrators implement a measure which, in their judgment is less effective than required, in the hope of passing judicial scrutiny, tragic and irreparable injury may result. As this Court has keenly observed, because the prisons "by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent conduct," Hudson v. Palmer, 468 U.S. 517, 526

(1984), there is an "ever-present potential for conflict and conflagration." Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 132. See also Whitley v. Albers, supra, slip op. at 8. Given these considerations, a lapse in security produced by less than completely effective rules and regulations is very likely to court disaster.

Because this Court has said that prison officials are "under an obligation to take reasonable measures to guarantee the safety of . . . inmates," Hudson v. Palmer, 468 U.S. at 526-27, any injury which results from less than adequate operational rules and regulations potentially subjects prison officials to liability in other civil rights litigation, not to mention that

commenced under the various laws of the amici States. If the standard of review specified by the Court of Appeals is endorsed by this Court, it will mean that prison administrators will face an unenviable dilemma: Whether to utilize measures they believe to be effective and to risk liability for First Amendment violations, or to institute measures which, in their estimation, are less than effective and thus risk liability in litigation stemming from injuries which may ensue.

All of these practical difficulties underscore the unacceptability of the standard in question here. Amici submit that those considerations, along with the reasons they have previously advanced, warrant this Court's rejection of that standard.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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